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Supreme Court of the United States.

OCTOBER TERM, 1946.

No. 88.

HELENE A. JESIONOWSKI, ADMINISTRATRIX,
Petitioner,

v.

BOSTON AND MAINE RAILROAD,
Respondent.

BRIEF FOR THE PETITIONER.

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BRIEF FOR THE PETITIONER.

A jury in the District Court for the District of Massachusetts returned a verdict for $20,000, in an action brought by the petitioner under the Federal Employers' Liability Act (U.S.C. Title 45, c. 2, secs. 51 *et seq.*), to recover compensation for herself and minor children because of the death of her husband, Stanley Jesionowski. Jesionowski was employed as a brakeman by respondent, and at the time that he was killed both he and the respondent were engaged in interstate commerce.

The Circuit Court of Appeals for the First Circuit reversed the judgment entered upon the verdict and remanded the case to the District Court with directions to enter judgment for the defendant railroad (R. 123).

On May 20, 1946, this Court granted certiorari.

Statement of Case.

On the morning of July 1, 1944, Stanley Jesionowski was instantly killed as the result of the derailment of a cut of four freight cars which had been cut off from a train of forty-nine freight cars standing on the main line of respondent's tracks near West Lynn, Massachusetts (R. 10, 11). This four-car cut was to be pulled ahead, westerly, on the main line, past the switch point B (Defendant's Exhibit No. 1, R. 111), and then backed into the "north siding," so called, which is the track nearest the "vacant building" shown on Exhibit No. 1. It was Jesionowski's duty to give a stop signal after the cut of cars had passed beyond point B, to throw the switch at B for the siding, and to ride the cut into the siding. The derailment occurred during the back-up movement (R. 10, 11, 12, 13). A more detailed statement of this switching movement, a description of the locus, and an account of the circumstances leading up to and surrounding the derailment will be found on pages 2, 3, 4, 10, and 11 of the petition for certiorari and petitioner's brief in support thereof.

Pleadings.

The complaint contained two counts, the second count being one for general negligence under which the case was submitted by the trial judge to the jury with instructions as to the nature and applicability of the doctrine of *res ipsa loquitur*. Neither party took exception to the whole or any portion of the judge's charge.

The disposition of the first count by the court, which the respondent claimed constituted *res adjudicata* as to the second count, will be discussed as the fifth point in this brief.

The respondent's answer to the second count, beside a denial of negligence, alleged the following:

> "And further answering the second count of the complaint, the defendant says that the plaintiff's intestate was guilty of negligence which was the *sole proximate cause* [italics ours] of his injuries and death.
>
> "And further answering the second count of the complaint, the defendant says that the plaintiff's intestate was guilty of negligence which contributed in whole or in part to his injuries and death." (R. 5, 6.)

Contributory negligence is not a defense under the Federal Employers' Liability Act, and it is not discussed in the opinion of the Circuit Court of Appeals.

The respondent did not rest at the close of petitioner's case, nor did it move then that a verdict should be returned for the respondent on the ground that the causative instrumentalities were not within the exclusive control of the respondent. On the contrary, the respondent undertook to show (1) that the instrumentalities were in proper condition and (2) that the deceased threw the switch while the switch points were between the trucks of the first or lead car of the cut of four cars intended for the north siding, and that thereby, by his own negligent act, he created the *sole* cause of his death. The pleading and attempt by the respondent to prove this *sole* causation, and the effect upon the applicability of the doctrine of *res ipsa loquitur* of such pleading and attempt at proof, are the only questions of law discussed in the opinion of the appellate court.

At the close of all the evidence respondent pressed its motion for a directed verdict on the second count, which was denied and exception saved (R. 97). In this motion respondent stated nine grounds for its allowance (R. 7, 8). Only grounds 7, 8, and 9 refer to Jesionowski's own act as

the sole cause of his death, *and not one of them raises the issue of the applicability of the doctrine of res ipsa loquitur.* The respondent also saved its exceptions to the refusal of the trial judge to give the jury certain instructions (R. 109, 110, 113). Only two of them, Nos. 6 and 7, relate to the only question discussed in the opinion of the appellate court, *i.e.,* the right of the petitioner to have the jury apply the doctrine of *res ipsa loquitur,* together with all the evidence in the case, in determining the liability of the respondent. These two requests are:

> "6. The doctrine of *res ipsa loquitur* is not applicable to the facts in this case.
>
> "7. The plaintiff's intestate had control of the switch at the time of the accident." (R. 110.)

It is important to note here that in neither of these requests did the respondent ask the court to instruct the jury as to control of "the stopping of the train to begin the switching, the giving of the signals, the throwing of the switch, the backing of the train, the condition of the track and the track bed, the switch mechanism, the car wheel flanges and other rolling stock equipment" (Opinion of Circuit Court of Appeals, R. 122). These extraneous objects of control were injected into the case by the appellate court. In so doing the court clearly went outside of the instructions requested, denied, and excepted to.

Opinion of the Circuit Court of Appeals.

The opinion appears *in toto* on pages 119 to 123, inclusive, of the record. It is reported in 154 F. (2d), beginning at page 703. We think there is nothing in the opinion upon which the reversal of the verdict can be based except the

portions relating to *res ipsa loquitur*. The opinion states (R. 121):

> "The court instructed the jury fully as to the doctrine of res ipsa loquitur, and this is claimed by the appellant as reversible error."

So far as the *doctrine* is concerned, it is to be noted that neither party excepted to the judge's charge, which consequently became the law of the case.

The specifications of error to be heard by this Honorable Court appear on pages 5 and 6 of the petition for the writ of certiorari. We repeat them here for ready reference. The appellate court erred—

1. In making the following ruling:

> "It is the theory of appellant that since the operation of the *switch*, which was to direct the four cars from the main line onto the siding, was in the control of Jesionowski, and that since the *instrumentality*, which was involved in the damaging accident, was not under exclusive control of appellant, the doctrine of *res ipsa loquitur* does not apply. Upon this question the trial court was most painstaking to explain that the jury should first consider whether or not the decedent was guilty of negligence, and that should they find him guiltless or at least guiltless as to any negligence contributing to the accident, the jury should then apply the doctrine of *res ipsa loquitur. This was error. The possible causal actions leading up to the fatal accident cannot be so separated.*"

2. In making the following ruling:

> "The 'thing' which caused the injury in our case was within the confines of a compound of several ele-

ments, including *the stopping of the train to begin the switching, the giving of the signals,* the throwing of the switch, *the backing of the train, the condition of the track and track bed, the switch mechanism, the car wheel flanges and other rolling stock equipment.* In this compound of elements the railroad corporation was not in exclusive control. Jesionowski was in control of important elements. In a very practical sense he, and not the corporation, was in control of very important elements, for he alone was in a position to observe; and it was his duty to observe and require the train to pull forward far enough for all of the wheels of the fourth car to clear the switch points before signaling the engineer to stop the forward movement, and the same duty continued after throwing the switch and before giving the signal to back."

3. In making the following ruling:

"The thing that caused the injury could have been Jesionowski's fault, or it could have been the railroad corporation's fault. It was the jury's duty to determine the cause of the accident, and since it must make that determination out of a set of facts wherein either one or both of the actors may have been at fault, it must do so without the aid of the doctrine of *res ipsa loquitur.*"

Points of Argument.

1. The words "instrumentalities" or "things," used interchangeably in statements of the doctrine of *res ipsa loquitur,* mean inanimate objects over which management or control can be exercised by human conduct. They do not include human conduct in and of itself.

2. Control, as that word is used in the doctrine, does not include the use or operation of the "instrumentality" or "thing" by an employee who is bound to use the "things" provided for him by his master in the performance of his duties to the master.

3. The careful or negligent use of a "thing" by an employee is a question of fact for the jury. It is one of the three things which must be determined before the rule can be applied by the jury.

4. If the jury had a right to apply the doctrine of *res ipsa loquitur*, together with all the other evidence in the case, then they were warranted in returning a plaintiff's verdict.

5. The fact that the trial judge ordered a verdict for the defendant on the first count of the complaint, under the circumstances disclosed by the record, did not create *res adjudicata* as to the second count.

Argument.

Point One.

It is evident that the decision of the appellate court rests principally, if not entirely, upon the false concept that the "thing" which caused the injury in the case at bar "was within the confines of a compound of elements." These are listed in the opinion as follows (R. 122):

(1) "the stopping of the train to begin the switching,"
(2) "the giving of the signals,"
(3) "the throwing of the switch,"
(4) "the backing of the train,"
(5) "the condition of the track and track bed,"
(6) "the switch mechanism,"
(7) "the car wheel flanges,"
(8) "other rolling stock equipment,"

No mention is made of the flying planks later found between the rails, nor of the frog.

Items 1, 2, 3, and 4 are not instrumentalities—physical, inanimate objects. Each one of these four items relates only to an act of the deceased. We can find no authority that supports the proposition that conduct, in and of itself, is a "thing" as that word is used in the definition of the doctrine of *res ipsa loquitur* as stated in the case of *San Juan Light Co.* v. *Requena,* 224 U.S. 89, at pages 98 and 99:

> ". . . when a thing which causes injury, without fault of the injured person, is shown to be under the exclusive control of the defendant, and the injury is such as in the ordinary course of things does not occur if one having such control uses proper care, it affords reasonable evidence, in the absence of an explanation, that the injury arose from the defendant's want of care."

It seems clear, upon analysis of the above definition, made intrinsically and without reference to decisions attempting to interpret the rule, that you cannot include in the word "thing," in the first line of the definition, acts of the employee in his use of the "thing." For example, the definition does not make sense if you say, "when the throwing of the switch by the deceased which causes the injury, without fault of the injured person, is shown to be under the exclusive control of the defendant"; and so, too, if any one of items 2, 3, or 4 is substituted. Nor would the substitution of "happening" or "occurrence" for the word "thing" serve the intended purpose of the doctrine, since the happening or occurrence might in some cases (and, as alleged by the defendant, in this case) prove to have been due solely to a plaintiff's negligence; in which event the thing does not speak for itself *against the defendant,* but

the evidence speaks specifically of the negligence of the plaintiff as the sole cause of his injury.

Looking at the point from the basis of legal precedent presents difficulty because the books are barren of authority in support of the thesis of the appellate court. Throughout the decisions of both state and federal courts the "thing" is consistently an "instrumentality," or an "article," or a "mechanism," or a "machine," or an "apparatus," or an "appliance." Citations in support of this statement are useless unless every case is cited, thereby excluding any precedential or text-book authority to the contrary. We can find no responsible authority which supports the concept that *conduct* is one element of the "thing."

The only section devoted by Professor Wigmore to the doctrine of *res ipsa loquitur* is section 2509, volume IX, beginning at page 377 (Third Edition, 1940). In this much cited work on evidence Wigmore heads this section: "Defective Machines, Vehicles and Apparatus." Nowhere in his article does Wigmore refer to *conduct* as a part of the doctrine. He speaks only of the control of an instrumentality, and it is clear that he is thinking of only that kind of *control* which has to do with the installation, maintenance, or repair of an instrumentality.

Again, in the extensive work of Shearman and Redfield on Negligence (Revised Edition, 1941) the text reads (p. 156): "The rule has been applied in many and various situations," and then proceeds to give specific examples of applicability and non-applicability. Many cases are cited on each side of this question, but in none of them does the "thing" involved mean conduct. "Things," it is to be concluded, are inanimate objects, capable of control by right or wrong human conduct.

Points Two and Three.

These points are related and will be considered together.

This brief contends that the words in the San Juan definition, "is shown to be under the exclusive control of the defendant," mean control by one having exclusive ownership of, or exclusive management and duty to maintain and repair, inanimate objects or "instrumentalities," and not temporary *user* control by an employee who *must* use the instrumentality in the performance of his duties to his master. Whether the temporary user control by an employee was exercised by him prudently or carelessly is, as we see it, an issue of fact, ordinarily for the jury, which must be determined antecedently in favor of a plaintiff before he can claim application of the doctrine. It is a question of behavior in the use of the instrumentality.

User Control.

User control means *behavior* by some one *using* the instrumentality. The San Juan definition clearly embodies this element, for it states: "When a thing which causes injury, *without fault of the injured person;*" etc. So the evidence must warrant a finding that the plaintiff was without fault, causative fault, and this fact must be determined *antecedently* to the application of the doctrine. It is not part of the doctrine itself. It is a fact utterly independent of the *condition* of the instrumentalities. The statement of the rule does not tolerate such a paraphrase as this: "and the injury is such as in the ordinary course of things does not occur if the one having control of the instrumentalities, *or if the injured employee who uses the instrumentality in the performance of his duty to his master,* uses proper care, it affords reasonable evidence, in the absence of an *explanation,* that the injury arose from defendant's want of care."

It seems beyond necessity of argument to affirm that the rule as stated in the San Juan case does *not* envision the negligence of a plaintiff in the *use* of an instrumentality as an element to be considered in determining whether or not the occurrence constitutes an unusual happening. For illustration, relevant both to "control" and to "unusual happening," let us assume, in the case at bar, that Jesionowski threw the switch properly in a mechanical sense, the indisputable fact upon the record, and that he threw it *after* the fourth car of the cut had passed beyond the switch points in its forward movement preparatory to backing into the north siding, and that then, having given his back-up signal, for some reason of convenience rather than necessity, he attempted to pass in front of the backward moving cars for the purpose of mounting the stirrup on the opposite side of the fourth or lead car, and that in such attempt he was run over and killed. On this set of facts could it be said that his death resulted from or had anything to do with legal causation growing out of the act of throwing the switch? And so, in the instant case, the specific negligent conduct of the deceased, relied upon by the defendant at the trial, was not in his throwing of the switch in an improper manner, but in throwing the switch at the wrong time. Both counsel for the railroad and the appellate court treated the act of throwing the switch at the wrong time as a matter of control; whereas the true act of negligence, if any, lay in decedent's failure to *observe* the position of the fourth car *when* he threw the switch. In other words, it is negligent *observation* and not negligence in operation which the jury had to decide one way or the other. The appellate court therefore clearly erred in treating the alleged act of Jesionowski as a matter of control of an instrumentality; and of course, as has been argued under point one, Jesionowski was not in control of an "instrumentality" when he directed the car movements.

Involved in this judicial error is the astounding proposition that, even if the jury found the deceased entirely faultless, nevertheless the doctrine could not be used by the jury, solely because the deceased, for a fraction of a minute, had his hands on the switch lever. Supposing Jesionowski had survived and testified flatly that the cut of cars had passed the switch points in their forward movement, and that he gave the back-up signal before the cars reached the switch in the back-up movement, and that witnesses for the defendant testified that they *saw* him throw the switch while the fourth or lead car was astride the switch points: On that state of the evidence may the trial judge say to the jury: "I am not permitted to let you pass upon the credibility of the witnesses and let you decide this issue, because Jesionowski *might possibly* have thrown the switch at the wrong time, and since he threw the switch, even though he threw it properly, you can draw no inferences against this defendant under the doctrine of *res ipsa loquitur*"? Such an instruction, if good law, would kill the doctrine in every case where a dead employee was, in the performance of his duty, using his master's instrumentality. The proposition that the issue of plaintiff's negligence in respect of "user" control is an antecedent question for the jury is supported by the recent case of *Sweeting* v. *Penn. R. Co.*, decided in the Third District May 1, 1944, 142 F. (2d) 611.

That case is a death action under the Federal Employers' Liability Act. In the District Court there was a direction of a verdict for the defendant on the grounds that *the action was attributable to the negligence of plaintiff's decedent* and that there was no negligence on the part of the defendant.

Decedent was an engine hostler engaged in moving electric locomotives from one place to another within a par-

ticular area. He was an experienced operator. He was sent to move a locomotive. After a little while there occurred at the power station evidence of an "outage" of power. The indication was that there was something wrong within the area of the "pit" where the locomotive was at rest. Two men sent out to investigate found Sweeting lying on the ground alongside the engine, which had not been moved from the pit. The clothing on the upper part of the body was in flames. He had both electric contact and flame burns, and he died six days later. Before he died, in response to the question, "How did this happen?" he replied: "I was on the electric engine pumping,—I came in contact with 11,000 volts." The report of the case goes on to explain in detail the various features of the engine, from which the jury *might* have found (as the defendant contended and tried to prove) that the deceased was killed through his own conduct in using the electrical apparatus negligently.

The court, at page 612:

> "Sweeting must be presumed to have been actually engaged in the performance of his duties and exercising due care for his own safety. Tennant, Admrx, etc., vs Peoria & Pekin Union Railway Co., 321 U.S. 29."

There follows in the opinion an analysis of the evidence relating to the question whether Sweeting was in or outside the cab when the fatal contact happened.

Continuing with the opinion:

> "From the *probabilities*, the time element, *the presumption that he was properly attending to his job with due care for his own safety*, and Sweeting's own testi-

mony, it could be inferred that he was within the locomotive cab when he was electrically shocked.

"It is true that the general rule in this type of case is that the burden of proof rests on the plaintiff to show that injury resulted from negligence on the part of the defendant. However, here, if the accident occurred in the cab, *then the very nature of the accident itself* and through the presumption it carries, supplies the requisite proof. *If Sweeting was shocked within the cab,* such accident, ordinarily speaking, would not have happened if those having control of the locomotive and of the cab, used proper care *and warrants the inference of negligence;* in other words, res ipsa loquitur."

It is evident that the court treated the question whether or not Sweeting received the shock inside the cab, and whether or not there was probability, upon all the evidence, that Sweeting handled the apparatus properly, as questions of fact for the jury. They were both antecedent. It is implicit in the opinion that, if the jury found that Sweeting was shocked while negligently trying to adjust something wrong, from the top of the engine, or was shocked through his own negligence in using the apparatus while within the cab, *res ipsa loquitur* would not be applicable; otherwise it would.

So, in the case at bar, it was an accurate statement of the law when the judge in his charge said that, if the jury found that the deceased did not throw the switch at the wrong time, then the doctrine was available to the plaintiff.

In addition to the Sweeting case there are other authorities which support our contention.

In Prosser on Torts (1941 Edition), at page 300, it is said:

"*Allied* to the condition of exclusive control in the defendant is that of absence of any action on the part of the plaintiff contributing to the accident. Its purpose, of course, is to eliminate the possibility that it was the plaintiff who was responsible. If the boiler of a locomotive explodes while the plaintiff engineer is operating it, the inference of his own negligence is at least as great as is that of the defendant, and res ipsa will not apply *until he has accounted for his own conduct.* But the requirement may easily be misunderstood. The plaintiff is seldom entirely static, and it is not necessary that he be completely inactive, *but merely that there be evidence removing the inference of his own responsibility.* If the evidence is sufficient to eliminate the plaintiff's contribution . . . the weight of modern authority is heavily in favor of the application of res ipsa loquitur to employees."

In American Jurisprudence, vol. 38, at page 997:

"The requirement that the instrumentality be under the management and control of the defendant does not mean, or is not limited to, actual physical control, but refers rather to the right of control at the time of the accident."

In *Canfley* v. *Missouri-Kansas-Texas R. Co.*, 353 Mo. 605, at page 618:

"The rule that the exclusive control and management of the *appliance* or the thing causing the injury must be shown to have been in defendant does not mean physical control but refers to the right of such control."

In *Van Horn* v. *Pacific Refining & Roofing Co.*, 27 Cal. App. 105, at page 109:

> "The rule to the effect that the exclusive control and management of the appliance causing the injury must be shown to have been in the defendant, must be taken to refer to the *right* of such control; *otherwise . . . the doctrine* of res ipsa loquitur could seldom if ever be given application."

In *Doughnut Machine Corp.* v. *Bibbey* (First Circuit), 65 F. (2d) 634, at page 635:

> "Defendant's claim that the accident was caused by the plaintiff herself inserting an iron rod into the machine was negatived by her testimony to the contrary—that the jury was fully justified in believing. *This was a pure question of fact for the jury.*"

And at page 636:

> "Under the res ipsa loquitur doctrine, it is sufficient *to make out a prima facie case* for a plaintiff to prove that he was not at fault, if that burden is on the plaintiff."

In *Osgood* v. *Los Angeles Traction Co.*, 137 Cal. 280, at page 283:

> "If the fault or negligence which was the proximate cause of the injury was attributable to some other vehicle under other and independent control, the defendant could so show, and that would be a good defense, *but the presumption of the defendant's negligence arises regardless of the fact that the injury may have been caused by some other agency.*"

In the case of *Scott* v. *The London & St. Katherine Dock Company*, 3 H. & C. 596 (1865), a leading English case, the language of the court is:

> "But where a thing is shown to be under the *management* of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the *management* use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."

The San Juan definition is closely modeled upon the English definition. It substitutes "exclusive control" for "management," a distinction without a difference in meaning; it substitutes "injury" for "accident," but this substitution serves rather to confuse the definition than to change the meaning of the English decision. The word "injury" seems to mean "the occurrence causing the injury." But in one respect there is an addition to the English rule. The words "without fault of the injured person" are added. They do not appear in the Scott case, nor in the equally famous barrel case (*Byrne* v. *Boadle*, 3 H. & C. 722), because the plaintiffs in those cases were innocent third parties. If, in the barrel case, the defendant had alleged that the plaintiff threw rocks at the barrel, causing it to fall, and had introduced some evidence tending, if believed, to establish that fact, then indeed the court would have needed to go further and say: "Of course, if the defendant persuades the fact-finding tribunal, by a fair preponderance of the evidence, that rocks were thrown by the plaintiff which *alone* caused the barrel to fall, *then you do not reach the application of the rule.* The plaintiff's own act was the sole cause of his injury." We think that the court in the San Juan case had in mind situations

like that hypothecated above, when it added the words: "without fault of the injured person." Every reasonable consideration leads to the conclusion that this court, in the San Juan case, did not intend the new addition to relate in any way to the issue of control or management.

It cannot be doubted that Jesionowski's alleged negligence was a question of fact for the jury which the defendant was bound to prove by a fair preponderance of the evidence.

Central Vermont Ry. Co. v. *White*, 238 U.S. 507, 512.
Palmer v. *Hoffman*, 318 U.S. 109.
Sampson v. *Channell*, 110 F. (2d) 754.
Hough v. *Texas & P. R. Co.*, 100 U.S. 213, 226.
Northern Pacific R. Co. v. *Mares*, 123 U.S. 710.
Northern Pacific R. Co. v. *Amato*, 144 U.S. 465.
Washington & Georgetown R. Co. v. *Harmon's Admr.*, 147 U.S. 571, 581.
Baltimore & Ohio R. Co. v. *Groeger*, 266 U.S. 521.
Leathem Smith-Putnam Navigation Co. v. *Osby*, 79 F. (2d) 280, 283, 284 (cert. denied, 296 U.S. 653).
Rayburn v. *Penn. R. Co.*, 76 F. (2d) 505.
O'Hara v. *Central R. Co.*, 183 Fed. 739.

In *Baltimore & Potomac R.R. Co.* v. *Landrigan*, 191 U.S. 461, the trial court instructed the jury (pp. 471-472):

> "In the absence of all evidence tending to show whether the plaintiff's intestate stopped, looked and listened before attempting to cross the south track, the presumption would be that he did. But that presumption may be rebutted by circumstantial evidence, and

it is a question for the jury whether the facts and circumstances proved in this case rebut that presumption, and if they find that they do, they should find that he did not stop and look and listen, but if the circumstances fail to rebut such presumption then the jury should find that he did so stop and look and listen. In order to justify them in finding that he did *not, all the evidence tending to show that should be weightier in the minds of the jury than that tending to show the contrary.*"

To this instruction the defendant railroad took exception, and this court said (last line of page 473):

"There was no error in instructing the jury that in the absence of evidence to the contrary, there was a presumption that the deceased stopped, looked and listened. . . . The presumption is founded on a law of nature. We know of no more universal instinct than that of self preservation—none that so insistently urges to care against injury. It has its motives to exercise in the fear of pain, maiming and death. There are few presumptions, based on human feelings or experience, that have surer foundation than that expressed in the instruction objected to."

The appellate court in the case at bar said that the injury *might* have been Jesionowski's fault. That is not the true test. The test is whether or not the presumption of due care, and the evidence in the case, sufficed, as a matter of law, to make a jury issue on the question of Jesionowski's alleged negligence. A guidance for all inferior courts as to the application of this test has been furnished in no uncertain terms, in cases under the Federal Employers' Lia-

bility Act, which have been decided recently by the Supreme Court of the United States.

Tiller v. *Atlantic Coast Line R. Co.*, 318 U.S. 54.
Bailey v. *Central Vermont Ry.*, 319 U.S. 350.
Tennant v. *Peoria & Pekin Union Ry. Co.*, 321 U.S. 29.
Lavender v. *Kurn*, 90 S.C. Law. Ed. 692, 696; 66 S. Ct. 740.

And see—

Murphy v. *Boston & Maine R.R.*, 319 Mass. 413 (Mass. Adv. Sh. 1946, 459).
Gregory v. *Maine Central R.R. Co.*, 317 Mass. 636, 639.
Leet v. *Atchison, T. & S. Fe Ry. Co.*, 66 Cal. App. (2d) 413, 420.
Bimberg v. *N.P. Ry. Co.*, 217 Minn. 187, 194.
Boston & Maine v. *Cabana*, 148 F. (2d) 150, 152 (First Circuit).
Sweeting v. *Penn. R. Co.*, 142 F. (2d) 611, 614.

We now consider the record of testimony, to which, as was said in the Tennant case (*supra*), at page 34, "*must be added* the presumption that the deceased was actually engaged in the performance of those duties and exercised due care for his own safety at the time of his death."

Whitney, the engineer in charge of the locomotive involved in the fatal movement, was the only witness who testified as to the behavior of the deceased. He was called of necessity by the plaintiff. Some of the important evidence relating to Jesionowski's behavior is to be found in questions 18 to 58, inclusive, on pages 11, 12, and 13 of the record. We feel certain that from this testimony, and the use of plain common sense, the jury reasoned to its conclusion that Jesionowski did *not* throw the switch at the

wrong time, somewhat as follows: Jesionowski cut the fourth from the fifth car as the train stood still on the main line facing toward Boston. He then signaled the engineer from the ground to go ahead, immediately thereafter mounting the stirrup at the rear end of the fourth car on the north or engineer's side. There he rode forward with the cut until *he was opposite the switch.*

Whitney, R. 12:

> "The Court. When he went to the switch did he go forward or backward?
>
> "The Witness. Simply opposite from where he was.
>
> "The Court. He was opposite the switch and he went sideways toward the switch?
>
> "The Witness. Yes.
>
> "Q. [By Mr. O'Brien.] That is, you mean he walked at right angles from the north-bound main to the switch? A. Yes."

Would a rational mind, considering the above testimony, which is all there was on this point, say that the fourth car stopped before it reached the switch points and that Jesionowski then, with the cars standing motionless, got off the rear stirrup and walked diagonally *forward* to the switch, passing the rear half of the fourth car? And that he then threw the switch without realizing that the fourth freight car had not cleared the switch points? We do not agree with that proposition. The jury did not agree. We think that the trial judge was skeptical about it, for he charged (R. 105):

> "If he did what the defendant says he did, *it was an unusual thing to do* and you would have a right to consider his experience in handling switches in determining whether or not he actually threw the switch before all the cars passed over it."

There is one more significant thing in the record relating to the time when Jesionowski threw the switch. The engineer, Whitney, testified that, from the place where he started to back-up, the cut of cars moved 120 feet when he saw splinters of plank flying and there was a derailment (R. 13). Now, if the derailment occurred at the frog, 75½ feet to the east of the switch points (R. 36), an alternative which the jury had a right to consider, and the cut of cars had already traveled 120 feet before the derailment, it is mathematically certain that the fourth car had passed 45 feet to the west of the switch points in the forward movement. On this hypothesis it is not reasonable to believe that Jesionowski waited until the fourth car, in the back-up movement, had traveled more than 45 feet before he threw the switch, nor that he threw it at a moment when the fourth car was *moving* backward over the switch points.

If the foregoing, plus the presumption of due care, stood alone for the consideration of the jury, we think that no court would be warranted in disturbing the jury's finding that the deceased was not negligent, a finding implicit in the jury's verdict because of the painstaking care with which the judge charged the jury on the question of Jesionowski's negligence.

The only evidence to support the defendant's plea that the deceased's death was solely caused by his own act consisted of testimony as to certain distances and the length of the engine and cut of four cars. It was evidence intended to support a refined mathematical calculation. The testimony came entirely from two witnesses, the locomotive engineer, Whitney, and the civil engineer, Harvey, both defendant's employees. This evidence indicates point "A" on Exhibit 1 as the point where the *front* of the engine was at rest just before the back-up movement began (R. 22). Harvey testified that by his own measurement point "A" was 224 feet westerly of the switch points (R. 35). Be-

cause of its importance we quote, with comment, the significant parts of the testimony of these two witnesses:

On direct examination Whitney testified (R. 11):

"Q. 30. When next did you see him? A. I took his go-ahead motion and started along.

"Q. 31. Yes. A. And *about* the point that we got up to the switch I started looking back for more motions."

On cross-examination by Mr. Garland the following occurred (R. 22):

"Q. 195. And when you stopped in response to that lantern signal was the front of your locomotive at a switch point or cross-over near the Saugus River where I am pointing on the plan? A. It was.

"Mr. Garland. Now may I make a mark on that 'A'?

"The Court. Yes.

"Q. 196. In other words, I am marking the letter 'A' at the point near the Saugus River where you say the *front* of your locomotive stopped after you had received a lantern signal from Mr. Jesionowski, is that right? A. That is right.

"Q. 197. Was the length of your locomotive *between* 71 and 80 feet? A. *Around* 80 feet.

"Q. 198. And were those freight cars *about* 40 feet? A. Yes.

"Q. 199. And was the space between every two cars for coupling purposes *about* 18 inches? A. *About* that.

"Q. 200. Now, after you had received the signal from Jesionowski to stop you stopped, you say, at a point where the 'A' is on the plan? A. Yes."

On direct and redirect examination (R. 30) Whitney testified that the "nose" of his locomotive was at the switch "B" when he came to a stop after the derailment, and that the total movement of the train from west to east in the backing movement was 135 feet (R. 29). But thereafter, in a series of redirect and recross-examinations, the following occurred (R. 30, 31, 32):

Recross-examination by Mr. Garland:

"Q. 269. Now as a matter of fact the *front* of your locomotive when you stopped was at that switch point marked 'B,' wasn't it?

"A. It was.

. . . . . .

"Q. 271. Now you say your locomotive was 75 to 80 feet long,—*I will call it 80 feet?* A. That is right.

"Q. 272. And the cars were 40 feet long each? A. That is right.

"Q. 273. And there were four cars? A. Yes.

"Q. 274. Well, if you had four cars 40 feet long, that would make 160 feet, plus the locomotive 80 feet, plus the space between the cars for the coupling, you would have backed 246 feet *if you estimate that way*, wouldn't you? A. I think so.

. . . . . .

"The Court. You tell us *what you figured out in your mind* so as to settle this thing. You take a piece of paper and pencil. I understand you are putting down on this paper what you figure in your mind before you answer the question.

"The Witness. Yes, sir.

"Q. 275. [By Mr. Garland.] Now put down 80 feet for the locomotive.

"The Court. Don't tell him. Let him tell us.

"Mr. Garland. All right.

"The Witness (figuring on paper). I make it 246 feet.

"Q. 276. [By Mr. Garland.] That is what I make it. You have put down locomotive 80 feet? A. That is right.

"Q. 277. Four cars, 40 feet each, that is 160 feet, then you have written down here 6 feet for the draw bar, totalling 246 feet? A. That is right."

Redirect examination by Mr. O'Brien:

"Q. 278. So when you told us you moved 135 feet, that was not correct? A. I should say yes.

"Q. 279. That it is correct? A. Yes.

. . . . . .

"Q. 281. You moved 135 feet? A. Yes."

Recross-examination by Mr. Garland:

"Q. 282. You figured the length of the cars and the length of the locomotive? A. Yes.

"Q. 283. And the space between the cars, the couplings? A. Yes.

"Q. 284. And you told us where the head of the locomotive stopped? A. Yes.

"Q. 285. Well, all right. And the other estimate of 135 feet is just a mere guess? A. Yes."

Redirect examination by Mr. O'Brien:

"Q. 286. And some of the other measurements that you have given us are guesses, are they not? You have been guessing about this, you didn't make any measurements? A. No, I did not.

"Q. 287. You have been guessing about them? A. Yes.

. . . . . .

"The Court. I think it is hardly fair. Was it your best recollection?

"The Witness. *All I had was two switch points for marks.*

. . . . . .

"The Court. *And you made no pretension of being accurate.*

"The Witness. *No.*"

The civil engineer Harvey, called by defendant, testified as to surveys and measurements made by him from which he drew Exhibit 1. On direct examination by Mr. Garland, Harvey was not asked a single question as to the length of the train. But on cross-examination he testified that he had measured the fourth car and found the length of it from knuckle to knuckle to be 44 feet 9 inches (R. 43, 44), not 40 feet as testified to by the witness Whitney; and the space occupied by the coupling apparatus between two cars 2 feet 6 inches (R. 44), not 18 inches as shown by Whitney's testimony. Harvey further testified on cross-examination (R. 44):

"Q. 101. . . . What is the measurement of the next car to the fourth? A. I don't know.

"Q. 102. Didn't you get any information on that? A. No, sir, I don't even know the number.

"Q. 103. Did you get it on the next car? A. No, sir.

"Q. 104. Did you get it on any other car but the fourth car? A. No, sir.

. . . . . .

"Q. 106. Where did you get the measurement [of the fourth car]? A. From the company record of this particular car.

"Q. 107. Did you ask for any record on the other cars? A. No, sir.

"Q. 108. Do you know whether the other cars were 60-foot cars or 35-foot cars or 40-foot cars? A. I don't know anything about it."

He also testified that the distance between the nearest wheels of one set of trucks of the fourth car to the other set of trucks was 25 feet 9 inches (R. 42), and that the length of the switch-point rails, terminating in tips at switch "B," was 15 feet (R. 37); so that in calculating a distance of backward train movement or of the length of the train there would be a tolerance for error of only 10 feet 9 inches.

The foregoing constitutes all of the evidence presented to the jury as a basis for calculation of the length of the train. It is submitted that this evidence would leave not only a layman's rational mind but also the mind of a trained mathematician imbedded in a morass of speculation.

The critical figure in defendant's straddle theory is 246 feet. Upon analysis it will be found that, if this distance is wrong, either too long or too short, by more than 10 feet 9 inches, the theory is defeated. Whitney only guessed at the length of the engine and cars. He guessed that each car was 40 feet long and that the space between cars was only 18 inches (R. 30, 31, 32). Harvey testified from measurements furnished him by the railroad. He said that the space between cars was 2 feet 6 inches instead of 18 inches, as testified to by Whitney. He also testified that the length of the fourth car, from knuckle to knuckle, was 44 feet 9 inches (R. 44). It is clear that Whitney and Harvey sharply disagreed, and the jury could not find

from the testimony of these witnesses what the true length of the cut of four cars and the engine was. Harvey did not ask the defendant for a record of the other three cars. He had no knowledge of their lengths (R. 44).

Point Four.

The defendant made no pretense that the injury was caused by an act of God or by the intervention of a third party.

The San Juan definition states three distinct prerequisites to be determined antecedently to the right of a jury to use the rule. They are—

1. That the plaintiff be without fault.
2. That the instrumentality which caused the injury be in the exclusive control of the defendant.
3. That the injury (better happening) is such as in the ordinary course of things does not occur if the one having such control uses proper care.

As to No. 1: This is a pure question of fact for the jury. In the case at bar the defendant undertook to prove that the deceased's own act was the sole cause of his death. The burden was on the defendant to persuade the jury, by a fair preponderance of the evidence, that this was true. The jury found the deceased to have been without fault.

As to No. 2: Ordinarily this too would be a question of fact; but the appellate court has ruled, as a matter of law, that the record shows that the defendant was not in exclusive control of the instrumentalities involved. We have argued that that ruling was erroneous. If we are right, then the ruling took away the plaintiff's verdict without warrant in law.

As to No. 3: If the brief is correct as to prerequisites Nos. 1 and 2 above, and if the jury had a right to find that the occurrence was an extraordinary one within the meaning of the San Juan doctrine, then the jury had a right to find the defendant guilty of causative negligence by taking the applicable doctrine as a presumption, or as constituting a prima-facie case, or as a basis for an inference, considered along with all the other evidence in the case. The appellate court did not reach this vital question, unless it can be said that this issue was disposed of in that paragraph of the opinion which we have assigned as the third specification of error. (The brief treats of the third specification a little later.)

If it was permissible for the jury to find, under the instructions of the trial judge, which were not excepted to, that the occurrence was an extraordinary one, and if the jury found the defendant's explanations unsatisfactory, as they did, then the occurrence or derailment in this case afforded "reasonable evidence that the injury arose from the defendant's want of care." This principle is stated in 38 American Jurisprudence, at page 1007, as follows:

> "According to most authorities the presumption or inference arising from the res ipsa loquitur doctrine constitutes evidence sufficient to take the case to the jury, even though the defendant introduces evidence which, if true, would be sufficient to rebut the presumption or inference of negligence."

There are many cases which suggest that no inference of negligence can be drawn from the happening of the accident alone; that there must be some attendant circumstance or circumstances which light up the incident and point to negligence on the part of someone. But that is not the law, as we all know, in passenger cases. In those

cases the derailment itself establishes a prima-facie case. We believe that there should be no distinction made between passenger cases and an employee case like the one at bar, providing prerequisites Nos. 1 and 2 are first satisfied. We think that this viewpoint is confirmed by the trend of decisions in cases under the Federal Employers' Liability Act.

In *Cachrane* v. *Pittsburgh*, 31 F. (2d) 769, a derailment case, it is said at page 773:

> "The Federal Employers' Liability Act supplemented by the Safety Appliance Act has entirely changed the situation. Now an employee of an interstate carrier . . . is entitled to recover as broadly as an interstate passenger. The differences are very slight, and such as do exist are probably in favor of the employee."

And see—

McNamara v. *Boston & Maine R.R.*, 202 Mass. 491.

Leet v. *Union Pacific R. Co.*, 144 P. (2d) 64.

The derailment in the case at bar ought to be sufficient, of itself, to raise a presumption in favor of the plaintiff or to permit an inference of negligence on the part of the defendant.

However, if we *must* have "surrounding circumstances" in order to characterize the incident as an extraordinary occurrence, we think they sufficiently appear in the record. If the derailment occurred at the switch, is it not remarkable that this happened despite the facts that the switch was thrown in a proper manner and at the right time? Or, if the derailment occurred at or near the frog, is it not remarkable that there were planks between the rails near

the frog? (R. 13, 18). Is it not remarkable that there were marks of wheel flanges on top of the rails 6 or 7 feet west of the frog, and somewhere near where the planks were found between the rails? (R. 76). Is it not possible that the front wheels of the fourth or lead car, in the backward movement, first hit the planks, rode on them in such a way that the front wheels took the main line, but yet displaced them so that the next two trucks, on the fourth and third cars, went off the rails and were thrown astride the north rail of the north siding? (R. 57). A witness for the defendant testified that a derailment could occur if the spring frog failed to open because of worn wheel flanges. Would such an event suggest an ordinary occurrence? And there is the body of the deceased beneath the truck of the third car (R. 15). There was no evidence that it had been dragged. How did it get there? There were things wrong with the frog. Were they all the result and not some of them the cause of the derailment? These were all matters for the jury's consideration. Can it be ruled, as a matter of law, that they do not constitute the necessary "surrounding circumstances," if such circumstances are needed in the plaintiff's proof? There is no direct evidence to show that the front wheels of the fourth car took the main line at the switch.

Engineer Whitney (R. 15):

"Q. [By Mr. O'Brien.] What did you find? A. I found one end of the car had gone back down the main line.

"Q. You found it was *on* the main line? A. Yes.

"Mr. O'Brien. I ask that be struck out, 'had gone back'.

"The Court. Yes.

"Q. You *found* one end of the car on the main line? A. That is right."

We submit that the derailment under the "surrounding circumstances" disclosed in this record furnished ample ground for a jury to find that the occurrence was one that does not happen in the ordinary course of things.

Counsel have been frustrated in repeated attempts to get at the meaning of that paragraph of the opinion of the appellate court which constitutes our third specification of error (Petition, p. 6). We have been unable to discover in that paragraph any relationship between the concepts therein stated and the doctrine of *res ipsa loquitur*. Indeed, it contravenes the doctrine. In the rule, the question of Jesionowski's participation in his injury is a question of fact for the jury. They are to find, not whether he *might* have been at fault—an issue of speculative possibility not of probability—but whether in *fact he was at fault*. Once that issue is decided in the deceased's favor, there is nothing left to be shown as to his fault. Certainly the language of the doctrine in the Requena case cannot be distorted to read: "The doctrine cannot be applied if the injury *might* have been the fault of the injured party." The practical results of the concepts set out in this third specification of error would be to deny the applicability of the doctrine, in every case where there was no proof available to the representative of the estate of the dead employee, of any specific cause of a derailment. In effect the appellate court say that in a true *res ipsa loquitur* case the doctrine cannot be applied.

Point Five.

The respondent's contention that counts 1 and 2 of the complaint were identical, and that therefore the directed verdict on the first count precluded recovery on the second count because the issues had become *res adjudicata*, made

its first appearance in appellant's opening brief on appeal (R. 121). The appellate court remarked (R. 121): "We refuse to consider the point made but as to its merits see Romana v. Boston Elec. Ry., 226 Mass. 532, 536," a case cited in the brief in behalf of the appellee in the Circuit Court. We believe this question was not saved to the appellant in its appeal to the Circuit Court of Appeals. We also fail to see substantial merit in the point raised.

Conclusion.

We respectfully submit that the rule in the Requena case should be interpreted as set forth in this brief; that is, that the doctrine in its entirety requires three distinct antecedents before the rule itself becomes applicable. We prefer this sequence: 1. The occurrence is of the kind that does not happen in the ordinary course of human events if the one having control of the causative instrumentality uses proper care (properly a jury question). 2. The instrumentality, an inanimate object, must be under the exclusive *management* of the party to be charged with negligence. The *use* of the instrumentality by the servant falls not within the sphere of the management control prerequisite, but rather is entirely included in the third antecedent. 3. The injured party must be found by the jury to have been guiltless of either contributory or solely causative negligence, and the burden of showing negligence in the injured party is upon the defendant who asserts such negligence and is to be satisfied by a fair preponderance of the evidence.

It is therefore respectfully submitted that the plaintiff's verdict in the District Court ought to be restored to her, with interest from the date of the verdict to the date of the final judgment in the District Court entered upon the man-

date of this court; together with legal costs which have accrued to the complainant in the District Court, in the Circuit Court of Appeals, and in this Honorable Court.

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